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IN THE

Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*,
Appellants,

and

ALFRED SMALLWOOD, *et al.*,
Appellant-Intervenors,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

On Appeal from United States District Court for the Eastern District of North Carolina

JURISDICTIONAL STATEMENT ON BEHALF OF THE SMALLWOOD APPELLANTS

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QUESTIONS PRESENTED

1. Is a state congressional district subject to strict scrutiny under the Equal Protection Clause simply because it is slightly irregular in shape and contains a higher proportion of minority voters than adjacent districts, when (a) it is not a majority-minority district, (b) it complies with all of the race-neutral districting criteria the state adopted to govern the design of the entire apportionment plan, and (c) there is neither direct nor compelling evidence that race was the predominant factor in its design?

2. In a challenge to a state congressional district, brought under the jurisprudence established by this Court in *Shaw v. Reno* and its progeny, is an inference drawn from the challenged district's shape and racial demographics, standing alone, sufficient to support a finding for the plaintiffs on the contested issue of the predominance of racial motives in the district's design, when it is directly contradicted by the testimony of the legislators who drew the district and evidence that the district conforms with the state's articulated redistricting criteria?

3. Following a finding of unconstitutionality in a challenge to a state congressional district, brought under the jurisprudence established by this Court in *Shaw v. Reno* and its progeny, is it an abuse of discretion for a district court to order the state to conduct redistricting immediately when redistricting would cause disruption to ongoing election processes and when redistricting will occur anew following the imminent release of the 2000 Census data?

PARTIES TO THE PROCEEDINGS

Actual parties to the proceeding in the United States District Court were:

(1) James B. Hunt, Jr., in his capacity as Governor of the State of North Carolina, Dennis Wicker in his official capacity as Lieutenant Governor of the State of North Carolina, Harold Brubaker in his official capacity as Speaker of the North Carolina House of Representatives, Elaine Marshall in her official capacity as Secretary of the State of North Carolina, and Larry Leake, S. Katherine Burnette, Faiger Blackwell, Dorothy Presser and June Youngblood in their capacity as the North Carolina State Board of Elections, defendants, appellants herein,

(2) Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins, defendant-intervenors, appellant-intervenors herein,

(3) Martin Cromartie, Thomas Chandler Muse, R.O. Everett, J.H. Froelich, James Ronald Linville, Susan Hardaway, Robert Weaver and Joel K. Bourne, plaintiffs, appellees herein.

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JURISDICTIONAL STATEMENT ON BEHALF OF THE SMALLWOOD APPELLANTS

Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins ("Smallwood Appellants"), white and African-American citizens and registered voters residing in either North Carolina's First or Twelfth Congressional District, appeal from the final judgment entered by the three-judge United States District Court for the Eastern District of North Carolina on March 8, 2000, which declares that the Twelfth Congressional District of North Carolina's 1997 congressional reapportionment plan, 1997 N.C. Sess. Laws, Ch. 11 ("1997 Remedial Plan"), violates the Fourteenth Amendment to the United States Constitution and enjoins further elections under that plan.

OPINIONS BELOW

The March 7, 2000 opinion of the three-judge district court is unreported and appears in the Appendix to the Jurisdictional Statement on Behalf of the State of North Carolina ("NC. J.S. App.") at 1a. The district court's final judgment, entered March 8, 2000, is unreported and appears at NC. J.S. App. at 71a. Previous decisions of earlier phases of this and related litigation are reported at *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994); and *Shaw v. Reno*, 808 F. Supp. 461 (E.D.N.C. 1992).

JURISDICTION

The judgment of the court below was entered on March 8, 2000. The Smallwood Appellants filed their notice of appeal to this Court on March 13, 2000. Appendix to the

Jurisdictional Statement on Behalf of the Smallwood Appellants at 1a. On April 27, 2000, the Chief Justice extended the time within which to docket the appeal in this case to and including May 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment, reproduced at NC. J.S. App. at 73a.

STATEMENT OF THE CASE

A. The Challenge to the Current Plan

This case is a challenge to the 1997 Remedial Plan, which is the third congressional redistricting plan enacted by the North Carolina General Assembly since the 1990 Census. This Court's ruling in *Shaw v. Hunt*, 517 U.S. 899 (1996), concerned the second congressional redistricting plan enacted by the North Carolina legislature following the 1990 Census ("1992 Plan").[1] In *Shaw*, this Court held that the 1992 Plan was unconstitutional because the location and configuration of District 12 violated the equal protection rights of some of the plaintiffs in the action.

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[1]The first post-1990 Census North Carolina congressional reapportionment plan, enacted in 1991, contained one majority-African-American district that was 55.69 percent African-American in total population and 52.18 percent African-American in voting age population. This Court discussed the history of the first plan in *Shaw v. Reno*, 509 U.S. 630 (1993) and *Shaw v. Hunt*, 517 U.S. 899 (1996). The second post-1990 Census reapportionment plan, enacted in 1992, contained two majority-African-American districts (the First and Twelfth Congressional Districts), but the Twelfth Congressional District was held unconstitutional in *Shaw v. Hunt*.

Shaw, 517 U.S. at 902.

On July 3, 1996, following the decision of this Court in *Shaw v. Hunt*, three residents of Tarboro, North Carolina, Appellees herein, filed the complaint in this action (*Cromartie v. Hunt*), challenging District 1 in North Carolina's 1992 Plan on the ground that it violated their equal protection rights because race predominated in the drawing of the district. A stay of that action was entered pending the resolution of the remand proceedings in *Shaw v. Hunt*.

On July 9, 1996 the same Tarboro residents joined the original plaintiffs in *Shaw* in filing an Amended Complaint in *Shaw*, raising a similar challenge to and asserting the same claims against the First Congressional District as they raised in *Cromartie v. Hunt*. On July 11, 1996, the members of the Smallwood Appellant group (three voters from the First District and six voters from the Twelfth District) sought to intervene in the *Cromartie* suit as defendants.[2]

Following this Court's remand in *Shaw v. Hunt*, the North Carolina General Assembly convened to develop a redistricting plan to remedy the constitutional infirmities found by this Court. On March 31, 1997, the North Carolina General Assembly enacted the 1997 Remedial Plan and submitted it to the three-judge court in *Shaw v. Hunt*, No. 92-202-CIV-5-BR (E.D.N.C.). The State also submitted the plan for preclearance by the United States Department of Justice pursuant to Section

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[2]The Smallwood Appellants also participated fully, as intervenors, in *Shaw v. Hunt* in the trial court and in this Court, including in the remedial proceedings which resulted in the approval of the 1997 Remedial Plan that is the subject of the present proceedings in this Court. *See infra.* p. 4.

5 of the Voting Rights Act, 42 U.S.C. § 1973c. On June 9, 1997, the Department of Justice precleared the plan. *See* NC. J.S. App. at 316a (*Shaw v. Hunt,* No. 92-202-CIV-5-BR, Memorandum Opinion (E.D.N.C. September 12, 1997)). On September 12,1997, the three-judge district court in *Shaw v. Hunt* unanimously approved the 1997 Remedial Plan as an adequate remedy for the specific constitutional violation found by the Supreme Court in *Shaw v. Hunt*. NC. J.S. App. at 312a. A map of the 1997 Remedial Plan is reproduced at NC. J.S. App. at 75a. The three-judge court then dismissed the case after Appellees Cromartie and Muse, who were also plaintiffs in *Shaw v. Hunt*, chose not to present their claims that the 1997 Remedial Plan was unconstitutional to the *Shaw* three-judge court.

The *Cromartie* three-judge court lifted its stay of proceedings on October 17, 1997. On the same day, two of the three original plaintiffs, along with four residents of District 12, filed an amended complaint in the *Cromartie* action, challenging the 1997 Remedial Plan as a violation of the Equal Protection Clause and still seeking a declaration that District 1 in the 1992 Plan is unconstitutional. Within the time allowed for answering that amended complaint, the Smallwood Appellants filed a renewed motion to intervene as defendants.

On March 31, 1998, the court below heard arguments on cross-motions for summary judgment and on the *Cromartie* plaintiffs' request for preliminary injunction.[3] On April 3, 1998,

[3]At the time of this hearing, the district court had not ruled on the motions to intervene of the Smallwood Appellants which had then been pending for over twenty months and four months, respectively. The court issued its permanent injunction and granted summary judgment without

the three-judge United States District Court for the Eastern District of North Carolina issued an order granting summary judgment to plaintiffs, declaring North Carolina's Twelfth Congressional District unconstitutional, permanently enjoining elections under the 1997 Remedial Plan, and ordering the State of North Carolina to submit a schedule for the General Assembly to adopt a new redistricting plan and to hold elections under that plan.[4] On April 14, 1998, the district court issued its opinion explaining its April 3, 1998 order.[5] NC. J.S. App. at 243a.

ruling on these unopposed motions or holding a hearing on intervention. In fact, the district court refused to allow counsel for the Smallwood Appellants an opportunity to bring the motion to intervene before it and expressly denied counsel for the Smallwood Appellants an opportunity to speak at the hearing.

[4]Although the court had not yet released an opinion, the State of North Carolina moved for a stay of the injunction pending appeal. The district court denied this motion. The State then filed an application with this Court for a stay pending appeal, and the Smallwood Appellants filed an *amicus curiae* memorandum in this Court in support of the application. This Court denied the request for a stay on April 13, 1998, with Justices Stevens, Ginsburg, and Breyer dissenting.

[5]On May 26, 1998, with their two prior unopposed intervention motions still pending, the Smallwood Appellants filed a third motion to intervene as defendants in the case. On June 20, 1998, after the deadline for filing a timely notice of appeal of the district court's April 3, 1998 order and April 6, 1998 judgment, the district court ruled that the Smallwood Appellants were entitled to intervene as of right in this action. As the delay in granting the motions to intervene prevented them from fully participating as parties in the district court and prevented them from being able to exercise their right to appeal, the Smallwood Appellants filed in this Court on October 2, 1998 a motion to intervene as Appellants in this case. This Court granted the motion on October 19, 1998.

B. Appeal of Summary Judgment Decision

This Court noted probable jurisdiction in *Hunt v. Cromartie* on September 29, 1998. Oral arguments were held January 20, 1999. On May 18, 1999, this Court unanimously reversed the lower court's decision and remanded for further proceedings. Justice Thomas in an opinion joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy,[6] first observed that the new District 12 was notably different than the original:

> By any measure, blacks no longer constitute a majority of District 12: blacks now account for approximately 47% of the district's total population, 43% of its voting age population, and 46% of registered voters. . . . The new District 12 splits 6 counties as opposed to 10. . . . With these changes, the district retains only 41.6% of its previous area. . . and the distance between its farthest points has been reduced to approximately 95 miles. . . .

Hunt v. Cromartie, 526 U.S. 541, 544 (1999) (citations omitted).

This Court also noted that, in evaluating a jurisdiction's motivation in creating a particular redistricting plan, a district court must engage in an inherently complex and "'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.* at 546 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)). This Court determined that the district court failed to conduct such an inquiry and improperly held that there were no

[6]Justice Stevens filed an opinion concurring in the judgment, in which Justices Souter, Ginsberg, and Breyer joined.

material facts in dispute. Rather, the Court observed that "[t]he legislature's motivation is itself a factual question" that was clearly in dispute. *Hunt v. Cromartie*, 526 U.S. at 549. This Court pointed to evidence that the legislature created the district "with the intent to make District 12 a strong Democratic district," *id.*, including the testimony of two legislators, who testified that the district lines are best explained by partisanship.

In addition, this Court found the testimony of an expert political scientist, Dr. David Peterson, probative. Dr. Peterson examined racial demographics, party registration and election results from the precincts within the district and those surrounding it. He found a strong correlation between the racial composition of the precincts and party preference, such that in precincts with a high African-American percentage, the voters tend to vote for Democrats at a high rate and in precincts with a low African-American percentage, the voters tend to favor Democrats at a significantly lower rate. Based upon Peterson's testimony, this Court reasoned that "the data tended to support both a political and racial hypothesis," *id.* at 550, and supported "an inference that the General Assembly did no more than create a district of strong partisan Democrats." *Id.*

This Court also found that Appellees offered only a limited analysis of a few selected precincts and this was insufficient to support a conclusion that the plan was an unconstitutional racial gerrymander. Thus, while in a few instances, the State had excluded precincts with lower proportions of African-American voters but equal or higher proportions of registered Democratic voters as the precincts included within District 12, *id.* at 548, there was an adequate basis to support the entry of summary judgment for the plaintiffs. On the other hand, the State's expert, Dr. Peterson,

was more thorough, analyzing *all* of the precincts bordering the interior and exterior of the district and examining actual voting results, not just registration data. *Id.* at 550.

In light of this evidence, this Court held that Appellees were not entitled to summary judgment. Citing prior precedents, this Court stated that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be African-American Democrats and even if the State were *conscious* of that fact." *Id.*, at 542 (emphasis in the original) (citing *Bush v. Vera*, 517 U.S. 952, 968 (1996); *Shaw v. Hunt*, 517 U.S. at 905; *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Shaw v. Reno*, 509 U.S. 630, 646), and that, based on the record before it, the motivation behind the creation of the district was in dispute and "it was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgement stage." *Hunt v. Cromartie*, at 552. Therefore, this Court reversed the lower court's judgment and remanded.

C. The District Court Trial on Remand

From November 29, 1999 to December 1, 1999, the district court held a trial during which it heard evidence regarding the rationale for the configuration of the 1997 Remedial Plan. State legislators testified at trial that in 1997, the General Assembly had two primary redistricting goals. The first was to remedy the constitutional defect found by this Court in the 1992 Plan: the predominance of racial considerations underlying the shape and location of District 12. NC. J.S. App.

at 82a - 83a, 138.[7] The second, but equally important, goal was to preserve the even partisan balance (six Republican and six Democratic members) in North Carolina's then-existing congressional delegation.

The General Assembly accomplished its first goal of enacting a plan free of constitutional defects by utilizing a variety of different redistricting techniques, including: 1) avoiding division of precincts and counties whenever possible; 2) avoiding use of narrow corridors to connect concentrations of minority voters; 3) striving for geographical compactness without use of artificial devices such as double cross-overs or point contiguity; 4) pursuing functional compactness by grouping together citizens with similar interests and needs; and 5) seeking to create districts that provide easy communication among voters and their representatives. NC. J.S. App. at 83a, 138a. Meeting the second goal of preserving the same partisan balance in the congressional delegation was essential to ensure that the General Assembly would be able to agree on a remedial plan, since the State House of Representatives was controlled by Republicans and the State Senate was controlled by Democrats. NC. J.S. App. at 83a-84a, 138a-139a.

State legislators testified, and the trial record reflects that during the 1997 redistricting process the General Assembly considered but ultimately rejected proposed plans that would have created a second majority-minority district in the area east of Charlotte toward Cumberland and Robeson Counties.

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[7] Although District 1 in the 1992 Plan was never determined to be unconstitutional, the General Assembly elected to redraw District 1 in 1997 to ensure its compliance with the post-1990 census decisions. NC. J.S. App. at 144, 148a-149a.

Several groups and individuals, including the North Carolina Association of Black Lawyers and State Representative Mickey Michaux, objected to the 1997 Remedial Plan because, in their view, it diluted the voting strength of African-Americans in certain areas of the state and "deliberately separate[d] large politically cohesive African-American communities." *See Shaw v. Hunt*, No. 92-202-CIV-5, Memorandum in Support of Motion to Intervene (E.D.N.C. filed April 15, 1997).[8]

While the State was predominantly motivated by a desire to remedy this Court's finding of liability and to meet various political interests, the trial record indicates that the General Assembly also had before it an extensive record concerning the historical exclusion of African-American voters, continuing racial appeals in North Carolina election contests, the socio-economic disparities affecting African-American voters' opportunities to participate in the political process, the lack of success of African-American candidates, and the continuing prevalence of racially polarized voting in North Carolina. *See*

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[8]Indeed, the majority of African-American legislators in the North Carolina House of Representatives voted against the 1997 Remedial Plan. *See* NC. J.S. App. at 140a, 152a, 153a. The plan favored by those opposed to the 1997 Remedial Plane was designed to avoid dilution; it also would have combined African-American voters in Charlotte with voters, including African-American and Native American voters, in rural areas southeast of Charlotte. The General Assembly concluded that such a district would have combined urban and rural voters with disparate and divergent economic, social and cultural interests and needs. Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-27N. Also, the General Assembly concluded that the proposed district lacked a natural means of communication and access among its residents. In addition, that district would have thwarted the goal of maintaining partisan balance in the State's congressional delegation. *Id.*

NC. J.S. App. at 34a (plaintiffs stipulated for purposes of trial that: the African-American population is politically, cohesive; the white majority votes sufficiently as a block to often enable it to defeat the minority's preferred candidate; for many decades African-Americans in North Carolina were victims of racial discrimination; and a substantial majority of the State's African-American population is still at a disadvantage in comparison to white citizens with respect to income, house, education, and health). *See also, e.g., Gingles v. Edmisten*, 590 F. Supp. 345, 359 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986); Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997 at 19-22; *id.*, Ex. 6 (Statement of Anita Hodgkiss) at 2-7; *id.*, Ex. 6, Tab 2 (Expert Report of Dr. Richard Engstrom) ("Engstrom Report"); *id.*, Ex. 6, Tab 17 (Expert Report of Dr. J. Morgan Kousser) ("Kousser Report"); *id.* at Ex. 6, Tab 17 (*Shaw v. Hunt*, Defendant-Intervenor stipulations) Nos. 1-58, 64-67).

Evidence at trial showed that the General Assembly succeeded in reaching its stated redistricting goals, particularly in creating District 12. While the 1992 Plan divided 80 precincts and 44 counties, the 1997 Plan divides only two precincts and 22 counties. District 12 in the 1997 Plan is significantly more compact geographically than it was in the 1992 Plan. The new District 12 contains parts of six counties, rather than ten, has no areas where contiguity is achieved only through "point contiguity" and does not contain any "cross-overs" or "double-cross-overs" as it did in the 1992 Plan. In the 1992 plan, District 12's boundaries divided 48 precincts, while District 12 in the 1997 Plan divides only one. NC. J.S.

App. at 84a, 139a[9]

The trial record demonstrates that the boundaries of the new District 12 were determined predominantly by partisan considerations and a desire to have an essentially urban, Democratic district in the Piedmont region. NC. J.S. App. at 84a. The configuration of District 12 reflects a strong correlation between the racial composition of the precincts and party preference of African-Americans in the district. NC. J.S. App. at 80a, 156a-157a, 170a-171a, 178a-180a. As a result, District 12's African-American total population was reduced from the original 56.63 percent in the 1992 Plan to 46.67 percent and the voting-age population was reduced from the original 53.34 percent in the 1992 plan to 43.36 percent.[10] NC. J.S. App. at 77a-79a.

D. The District Court Opinion and the Current Appeal

On March 7, 2000, over three months after the conclusion of the trial, the district court issued its decision. In an opinion strikingly similar to its prior summary judgment ruling, the Court found as a matter of fact, based upon the uncontroverted testimony of Senator Roy A. Cooper, that the House and Senate General Assembly committees formed to

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[9]*See also Hunt v. Cromartie at* 544 ("By any measure, blacks no longer constitute a majority of District 12: blacks now account for approximately 47% of the district's total population, 43% of its voting age population, and 46% of registered voters. . . . The new District 12 splits 6 counties as opposed to 10. . . . With these changes, the district retains only 41.6% of its previous area. . . and the distance between its farthest points has been reduced to approximately 95 miles. . . .") (citations omitted).

[10]The trial record also shows that District 12 residents share a distinct community of interest. *See, e.g.*, NC. J.S. App. at 84a.

address the defects found by this Court "aimed to identify a plan which would cure the constitutional defects and receive the support of a majority of the members of the General Assembly." NC. J.S. App. at 11a. The court also accepted the uncontroverted affidavit testimony of Senator Cooper and Gary O. Bartlett, Executive Secretary-Director, State Board of Elections, that "[i]n forming a workable plan, the committees were guided by two avowed goals: (1) curing the constitutional defects of the 1992 Plan by assuring that race was not the predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation." *Id.* The court below also found that the 1997 Remedial Plan met the goal of maintaining the existing partisan balances by "avoid[ing] placing two incumbents in the same district" and "preserv[ing] the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan." *Id.* The court cited no evidence that directly contradicted the testimony introduced by the State to the effect that the legislature sought, in creating the 1997 Remedial Plan, to cure the constitutional defects found by this Court by ensuring that race did not predominate in its creation while minimizing partisan and political disruption.

Nevertheless, the court below found that race was the predominant factor in the creation of the 1997 Remedial Plan based largely upon its own assessment of (a) District 12's racial demographics and shape, (b) the racial characteristics of a limited number of precincts that were or were not included in the district, and (c) mathematical measures of District 12's relative compactness. *Id.* at 11a-17a. While the court asserted that "[a] comparison of the 1992 District 12 and the present District is of limited value here," *id.* at 24a, it concluded that

District 12 in the 1997 Remedial Plan is as "unusually shaped" as District 12 in the 1992 Plan. *Id.* Focusing almost exclusively on demographic data and the district's configuration, the court found "as a matter of fact that the General Assembly, in redistricting, used criteria with respect to the Twelfth District that are facially race driven." *Id.* at 28a. Finally, despite extensive conflicting factual evidence, the court below concluded that "[t]he legislature eschewed traditional districting criteria such as contiguity, geographical integrity, community of interest, and compactness in redrawing the District as part of the 1997 Plan." *Id.* at 29a.

The court found that no evidence of a compelling justification for the creation of District 12 was presented and determined that "even if such an interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny'." *Id.* The lower court, thus, never proceeded to assess whether District 12 was narrowly tailored to satisfy an identified compelling justification.[11] Instead, the court proceeded to conclude that "District 12 is an impermissible and unconstitutional racial gerrymander in

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[11]Therefore, the court never considered or discussed whether the creation of District 12 could be justified by a compelling interest in remedying the current effects of North Carolina's long history of political exclusion and in avoiding dilution of minority voting strength. The court ignored evidence presented by the State that its "primary goals [of remedying the constitutional defects found in the 1992 Plan and preserving partisan balances in the congressional delegation] were accomplished while still providing minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12)," Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-27N, and that "District 12 in the State's plan also provides the candidate of choice of African-American citizens a fair opportunity to win election." *Id.*

violation of the Equal Protection Clause" and ordered the State to "redistrict the 1997 Plan in such a way that it *avoids the deprivation of the voters' equal protection rights not to be classified on the basis of race*," leaving the State "free to use *other, proper* factors in redistricting the 1997 Plan." NC. J.S. App. at 29a (emphasis added). While ruling that race was also the predominant factor in the creation of District 1, the court held that the district was narrowly tailored to meet North Carolina's compelling state interest of complying with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. NC. J.S. App. at 35a

Judge Thornburg joined the majority insofar as it held that District 1 is constitutional; however, he dissented from the majority opinion that District 12 is an unconstitutional racial gerrymander. Judge Thornburg acknowledged the difficult challenges that confronted the North Carolina General Assembly during the 1997 redistricting process. During this process, according to Judge Thornburg, the State faced a myriad of "conflicting agendas and influences," including incumbency considerations and partisan political concerns. NC. J.S. App. at 38a. Judge Thornburg concluded that the majority was incorrect to conclude that from this "cauldron" race emerges as the predominant motivating factor leading to the creation of District 12. *Id.* He suggested that it would be impossible for the State to "navigate these treacherous waters without being aware of the issue of race," since "race loomed as *the* reason why the General Assembly had to redraw districts in the first place." NC. J.S. App. at 38a-39a (emphasis in the original). However, he concluded that it was improper for the majority to determine that race "impermissibly predominated, in a process where consciousness of race is not prohibited." *Id.* at

39a (footnote and citations omitted). In so concluding, the majority failed to hold the plaintiffs to their burden of proof and properly credit the testimony of the two state legislators who drove the 1997 redistricting process. *Id.*

REASONS FOR NOTING PROBABLE JURISDICTION

In striking down North Carolina's Twelfth Congressional District, the district court misapplied this Court's precedents and imposed its own subjective redistricting preferences as the measure of the district's constitutionality. The lower court erred by conflating any consciousness or awareness of race with the application of strict scrutiny and a finding that District 12 is a racial gerrymander. In addition, the court erred by failing to examine whether any compelling justification could exist for the creation of the challenged district. Finally, the district court exceeded its authority in ordering that the state develop a remedy after the election process had begun and only a year before a new plan would have to be developed following the release of the 2000 census data.

The district court's decision, if upheld, would render meaningless this Court's holding in *Shaw* and its progeny that strict scrutiny would apply only if it is found that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Bush*, 517 U.S. at 952 (*quoting Miller*, 515 U.S. at 913). The district court's reasoning would apply strict scrutiny to all districts drawn for political purposes even if race was only found to be one of several factors in the redistricting process.

I. The Court Erred by Effectively Holding that Race-consciousness Triggers "Strict Scrutiny."

As noted *supra* in the Statement of the Case, the court below failed to assess most of the evidence presented by the Defendants and Defendant-Intervenors at trial. Instead, the court recited statistics concerning the racial composition and political party registration of voters in a small number of precincts placed inside or outside of District 12. Without even addressing the other factors that state legislators took into account in the redistricting process, the court concluded from its limited factual recitation not only that the 1997 Remedial Plan was race-conscious, but also that it must be struck down as motivated *predominantly* by racial considerations. Indeed, the district court ordered that, in designing its remedy, the State should limit the factors it could use in its redistricting to factors other than race, characterizing only those non-racial factors as proper. NC. J.S. App. at 29a.

In the circumstances of this case, this ruling amounted to a holding, contrary to this Court's repeated admonitions, that race-conscious districting is inherently unconstitutional. Because such a rule would eviscerate the protections against minority vote dilution provided by Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and is flatly inconsistent with this Court's *Shaw* decisions, the judgment below must be reversed.

As this Court has held, Appellees' evidentiary burden in this case is to show that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Bush*, 517 U.S. at 952 (*quoting Miller*, 515 U.S. at 913), and "that other, legitimate districting principles were 'subordinated' to race."

Bush, 517 U.S. at 958. *See generally id.* at 259-68. It is insufficient for a court to find, as here, that a redistricting process was conducted with some "consciousness of race." *See Bush*, 517 U.S. at 1051. As Justice O'Connor has observed:

> States may intentionally create majority-minority districts and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected, *and* that neglect is predominantly due to the misuse of race, does strict scrutiny apply.

Bush, 517 U.S. at 993. (O'Connor, J., concurring) (emphasis in original); *see also United States v. Hays*, 515 U.S. 737, 745 (1995) ("We recognized in *Shaw*. . .that the 'legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination'") (citation omitted) (emphasis in original).

In *Shaw v. Reno*, 509 U.S. at 653, this Court held that it would be the extraordinary case in which strict scrutiny would apply. Indeed, in *Shaw*, *Miller*, and *Bush*, the district courts applied strict scrutiny only after they determined that race played a *predominant* role in the design of the districts at issue. *Miller*, 515 U.S. at 928 (O'Connor, J., concurring); *Shaw v. Hunt*, 517 U.S. at 903; *Bush*, 517 U.S. at 952. And those determinations were not based upon mere "race consciousness." For example, in *Shaw v. Hunt*, this Court found sufficient "direct evidence" that the State's "overriding purpose" was to "create two congressional districts with effective black voting *majorities*" and that other considerations "came into play only after the race-based decision had been made." *Shaw v. Hunt*,

517 U.S. at 906 (original emphasis omitted and emphasis added). In *Miller*, the State conceded that the district at issue was the "product of a desire by the General Assembly to *create a majority black district*," *Miller*, 515 U.S. at 918 (emphasis added), and that the creation of the district "violate[d] all reasonable standards of compactness and contiguity." *Id.* at 919. The court below made no such findings and the record below demonstrated that race did not predominate in the creation of the district.

This Court has repeatedly recognized the reality of race-consciousness during the redistricting process and reserved strict scrutiny only to those circumstances where race predominated. *See, e.g., Bush*, 517 U.S. at 958 ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Nor does it apply to all cases of intentional creation of majority-minority districts") (citations omitted); *Lawyer v. Department of Justice*, 521 U.S. 567 (1997) (upholding the constitutionality of a Florida state legislative districting plan that was drawn with conscious consideration of race to settle litigation challenging prior plan, creating majority-minority district that afforded minority voters opportunity to elect candidates of choice that was somewhat irregularly shaped and that split county and city boundaries); *Abrams v. Johnson*, 521 U.S. 74 (1997) (approving congressional districting plan for Georgia having majority-African-American district); *King v. State Board of Elections*, 522 U.S. 1087 (1998) (*per curiam*) (summarily affirming district court ruling upholding the constitutionality of Illinois' Fourth Congressional District). This principle has been consistently applied by various district and appellate courts that have considered constitutional challenges brought under the

Shaw regime. *See, e.g., Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Theriot v. Parish of Jefferson*, 185 F.3d 477 (5th Cir. 1999); *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd*, 515 U.S. 1170 (1995),[12]

This Court's most recent ruling in *Hunt v. Cromartie* itself is most instructive. In ruling that the lower court was in error to hold District 12 unconstitutional without a trial, this Court concluded that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. at 542 (emphasis in the original) (citing *Bush*, 517 U.S. at 968; *Shaw v. Hunt*, 517 U.S. at 905; *Miller*, 515 U.S. at 916; *Shaw v. Reno*, 509 U.S. at 646). This Court determined that

> Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.

[12]A further understanding of the *DeWitt* decision can be gained by reviewing the decision of the California Supreme Court that created the redistricting plans challenged in *DeWitt*. *See Wilson v. Eu*, 823 P.2d 545, 563-64, 582, 583-84, 594, 1 Cal. 4th 707, 746, 775, 776, 790, 4 Cal. Rptr. 2d 379, 397-8, 416, 417-8, 428 (1992) (describing the various special efforts taken to create districts that would comply with the Voting Rights Act).

Hunt v. Cromartie at 526 U.S. at 542. In view of *Cromartie*, it is clearly evident that if a jurisdiction draws district lines to fulfill partisan political objectives, the fact that a large number of residents of the district are also members of a racial minority group does not, in and of itself, convert the district to a "racial gerrymander."

Thus, even if the Twelfth Congressional District created by the 1997 Remedial Plan had been a majority-minority district that would not, standing alone, compel a finding of unconstitutionality. The fact that the State included strong Democratic performing precincts in District 12, that a number of these precincts were majority African-American, and that those leading the redistricting process were aware of that fact, does not constitute a violation of the Constitution. To hold otherwise would invalidate this Court's holding in *Cromartie* that permits a state to meet its partisan political goals even if it is aware of the race of the voters used in the process. It would automatically render any plan drawn with even the mere awareness of race unconstitutional. As the prior iteration of the case before the Court, *Cromartie* provides the template for analyzing the claims presented in this case. The lower court failed to cite to or discuss this Court's analysis *Cromartie* and in so doing failed to acknowledge this important precedent.

Equally significant, the court below failed to give any consideration – much less appropriate weight – to the political realities confronted by the General Assembly during the redistricting process. Although the General Assembly's primary goals in enacting the 1997 Remedial Plan were to correct the prior constitutional violation found by this Court in *Shaw v. Hunt* and to preserve the congressional delegation's partisan balance, the State could not achieve these goals in a political

vacuum. As the testimony showed, among other political considerations, legislators were concerned that the plan developed be racially fair. NC. J.S. App. at 121a, 130a, 147a-148a, 151a. This was not only important given the history of political exclusion and discrimination that was in the record before the General Assembly members, but was also necessary to achieve the political goals of securing enough support for the 1997 Remedial Plan from African-American political and legislative leaders in the General Assembly. *See* NC. J.S. App. at 151a, 147a. Such considerations do not relegate a redistricting plan to strict scrutiny. *See Lawyer*, 521 U.S. at 581 (upholding the constitutionality of a majority-minority district that district court found "'offers . . . any candidate, without regard to race, the opportunity' to seek and be elected to office") (quoting and citing *Scott v. United States*, 920 F. Supp. 1248, 1256 (M.D. Fla. 1996)); *DeWitt*, 856 F. Supp. at 1413-14 (finding that the California redistricting plan, containing intentionally created majority-minority districts, was not an unconstitutional racial gerrymander because the plan "evidences a judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process").

II. The District Court Erred by Failing to Determine Whether the State had a Compelling Justification for Creating a Narrowly Tailored District 12

Even if the district court was correct to find that race was the predominant factor in the drawing of District 12, the court erred by failing to consider whether it was narrowly tailored to achieve an identified compelling governmental

interest.

As discussed, *supra*, the district court concluded that, in drafting the 1997 Remedial Plan, the State disregarded traditional redistricting criteria and found that race was the predominant factor in the creation of District 12. But, the court never engaged in the necessary strict scrutiny analysis, assessing whether District 12 was narrowly tailored to satisfy an identified compelling justification. Rather, the court found that no evidence of a compelling justification for the creation of District 12 was presented[13] and determined that "even if such an interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny.'" NC. J.S. App. at 29a. The lower court, thus, never conducted the required analysis to determine whether District 12 was narrowly tailored to satisfy a specified compelling justification.

Even where a court finds that race predominated in the redistricting process, its inquiry does not end. This Court's *Shaw* jurisprudence requires a court to assess whether there was a compelling justification for a plan drawn with race as a predominant factor, and whether the plan was narrowly tailored to serve that justification. *See, e.g., Shaw v. Hunt*, 517 U.S. at 914 (assuming without argument that "§ 2 could be a compelling interest"); *Miller*, 515 U.S. at 915 (race-consciousness in drawing district lines would not alone render a districting plan presumptively unconstitutional). The lower court erred by discontinuing its inquiry once it concluded that race predominated in the creation of District 12.

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[13]This finding is clearly erroneous in light of the parties' stipulation referred to *infra*.

If the district court had engaged in the correct analysis, it would have had to conclude that the 1997 Remedial Plan is justified. The trial record indicates that, in creating the plan, the legislature was aware of North Carolina's long history of official discrimination against African-Americans and their exclusion from the political process due to state and private action. In addition, plaintiffs stipulated to this history and its lingering effects. *See* NC. J.S. App. at 34a. Moreover, there was evidence that the State sought to "provid[e] minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12)," NC. J.S. App. at 64a, and that District 12 does afford African-American voters a fair chance to elect their candidate of choice. *See* NC. J.S. App. at 66a. The district court erred in not engaging in the rigorous strict scrutiny inquiry required by this Court.

III. The District Court Erred in Ordering Redistricting on the Eve of the Post-2000 Census Redistricting Cycle

The district court's decision came on the eve of the 2000 redistricting and just days before absentee balloting for the 2000 congressional primary election was to begin. However, the delay of this case began months earlier, when, despite the urgency of the State's election schedule, the district court failed to issue its discovery schedule until August 23, 1999, three months after this Court's decision. Although the district court was aware that the State's election process had begun, it nevertheless delayed over three months after an expedited trial to issue its opinion. In the time that the trial court took to issue its opinion, the State's election process was fully engaged.

Any remedy in this case that requires redistricting threatens to disrupt the on-going election process, perhaps

requiring a new primary and a delay in the general election. Appellees have indicated clearly that they will seek just such a remedy. *See, e.g.*, Appellees' Motion to Expedite Schedule for Appeal. The injury from disrupting election processes is significant and has been well documented by this Court and the federal trial courts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964).[14] Moreover, minority voters are particularly injured by this disruption. *See* Smallwood Appellants' Application to Stay Decision of the United States District Court for the Eastern District of North Carolina Pending Appeal at 2-6. The harms

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[14]These principles have guided federal trial courts in both reapportionment and vote dilution cases. *See, e.g., Diaz v. Silver*, 932 F. Supp. 462, 466 (E.D.N.Y. 1996) (preliminary injunction denied to avoid harming public interest where elections scheduled in a few months, even though court found likelihood of success on *Shaw* claim and irreparable injury to plaintiffs); *Cardona v. Oakland Unified School District*, 785 F. Supp. 837, 843 (N.D. Cal. 1992) (court refused to enjoin election where primary "election machinery is already in gear," including the passage of deadline for candidates to establish residency and start of candidate nominating period); *Republican Party of Virginia v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991) (injunction denied in case with "uncertain cause of action with only possible irreparable harm" and where time for election was close and there was danger of low voter turnout if election postponed); *Cosner v. Dalton*, 522 F. Supp. 350 (E.D. Va. 1981) (three-judge court) (use of malapportioned plan not enjoined where elections were two months away); *Shapiro v. Maryland*, 336 F. Supp. 1205 (D. Md. 1972) (court refused to enjoin election where candidate filing deadline was imminent and granting relief would disrupt election process and prejudice citizens, candidates and state officials); *Sincock v. Roman*, 233 F. Supp. 615 (D. Del. 1964) (three-judge court) (*per curiam*) (enjoining election would result in disruption in ongoing election process which would cause confusion and possible disenfranchisement of voters); *Meeks v. Anderson*, 229 F. Supp. 271, 274 (D. Kan. 1964) (three-judge court) (court held malapportioned districts unconstitutional but concluded that the "ends of justice" would "best be served" by permitting elections to proceed).

that could result from such disruption prompted the three-judge district court in the earlier litigation in *Shaw v. Hunt* litigation to deny injunctive relief to plaintiffs in 1996, where only a few months remained before the general election. *See also Reynolds*, quoted *supra*, 377 U.S. at 585 ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid"). *See also Watkins v. Mabus*, 502 U.S. 954 (1991); *Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976); *Ely v. Klahr*, 403 U.S. 108 (1971). Thus, even if the court below was correct in holding that District 12 is unconstitutional, it nevertheless erred by requiring immediate relief, when such relief would disrupt an election process that was so far advanced.

Moreover, in less than one year, the Census Bureau will release the 2000 Census data and the State will begin the redistricting process anew, a process that inevitably will result in at least some Congressional districts being redrawn. To require the State to engage in the disruptive process now only to repeat it in less than a year would be unduly burdensome and duplicative. *Cf. Maxwell v. Foster*, No. 98-1378, (W.D. La. Nov. 24, 1999), attached to the Smallwood Appellants' Application to Stay Decision of the United States District Court for the Eastern District of North Carolina Pending Appeal as Appendix E.

As the next redistricting cycle is imminent, allowing the state to proceed with elections under the 1997 Remedial Plan would not permanently prevent plaintiffs from acquiring the

remedy they seek: a new redistricting plan. If during or after the 2000 redistricting cycle, plaintiffs are not satisfied with the new plan, they may participate in the process of creating a more palatable plan or challenge the constitutionality of the plan subsequently. The reasoning of the court in *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 502 (7th Cir. 1991) is directly on point:

> The district court also concluded that, on equitable grounds, the pending 1991 redistricting (based on the 1990 census) makes entry of relief inappropriate. The district court did not err in making this finding. The legislative reapportionment is imminent, and Districts 49 and 51 may well be reshuffled. The legislature should now complete its duty, after which the plaintiffs can reassess whether racial bias still exists and seek appropriate relief.

Furthermore, this is consistent with the most recent decisions of district courts that have considered constitutional challenges to redistricting plans late in the decade. *See, e.g., Maxwell v. Foster*, No. 98-1378, slip op. at 7 and 8 (W.D. La. Nov. 24, 1999) (district court granting State of Louisiana's motion for summary judgment and finding that "rapid-fire reapportionment immediately prior to a scheduled census would constitute an undue disruption of the election process, the stability and continuity of the legislative system and would be highly prejudicial, not only to the citizens of Louisiana, but to the state itself"), attached to the Smallwood Appellants' Application to Stay Decision of the United States District Court for the Eastern District of North Carolina Pending Appeal as Appendix E. Therefore, even if this Court should hold District 12 unconstitutional, rather than requiring the State to engage in a

disruptive redistricting process that will invariably produce districts drawn according to inaccurate data, this Court should act consistent with well-established precedent to permit the State to proceed with the 2000 elections under the 1997 Remedial Plan.

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the judgment of the district court. In the alternative, this Court should note probably jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Civil Action No. 4:96-CV-104

MARTIN CROMARTIE, *et al.*
Plaintiffs,

v.

JAMES B. HUNT, JR., *et al.*,
Defendants,

and

ALFRED SMALLWOOD, *et al.*,
Defendant-Intervenors.

FILED
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DAVID W. DANIEL, CLERK

DEFENDANT-INTERVENORS' NOTICE OF APPEAL

Notice is hereby given that Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins, Defendant-Intervenors, hereby appeal to the Supreme Court of the United States from March 8, 2000 Judgment and the March 7, 2000 order declaring North Carolina's Twelfth Congressional District unconstitutional and

enjoining the State of North Carolina from using the district in future elections.

This appeal is taken pursuant to 28 U.S.C. Sec. 1253.

This the 13th day of March, 2000

Respectfully Submitted,

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